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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SALVATORE CIRAMI and MARGARET CIRAMI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether the findings of the District Court, on a hearing of defendants-petitioners' application pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, that they have not shown compelling circumstances and extreme hardship to vacate a summary judgment entered against them in the amount of almost $300,000.00 was clearly erroneous as being against the weight of the evidence presented at the hearing, including evidence of the mental problems and suspension from practice of their then attorney?

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Petitioners Salvatore and Margaret Cirami pray that a writ of certiorari be issued to review the order of the United States District Court for the Eastern District of New York dated December 8, 1981, affirmed by the United States Court of Appeals for the Second Circuit on May 6, 1982, petition for a rehearing denied on June 3, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is not reported. The text of the opinion is attached as Appendix A, *infra*.

The order of the United States Court of Appeals for the Second Circuit affirming the District Court is not yet reported, and is attached as Appendix B, *infra*. The order of the Court of Appeals denying the petition for rehearing is likewise not yet reported, and attached as Appendix C, *infra*.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit denying the petition for a rehearing was entered on June 3, 1982. The jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 United States Code, Rule 60.

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made from the operation of the judgment. The motion shall be made within a reasonable time, and

for reasons, (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the Court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. *Factual Background*

During the years 1961, 1962 and 1963, petitioner Salvatore Cirami (hereinafter "Cirami") operated, as a sole proprietorship, a business known as Air Freight Haulage Co., which was engaged in the business of supplying truck transportation services for merchandise of its customers. In the regular course of conducting his business, Cirami caused contemporaneous books and records to be maintained reflecting the receipts and expenditures of Air Freight Haulage Co.

To insure that the books and records of Air Freight Haulage were properly maintained, Cirami employed the services of two registered public accountants, Seymour Unterberg and Bernard Zipern.[1] Since Cirami operated Air Freight Haulage Co. as a sole proprietorship during the years 1961, 1962 and 1963, the

[1] Both Unterberg and Zipern submitted affidavits in connection with the services rendered to Salvatore Cirami. Each stated that they performed monthly bank reconciliations and verified the disbursements made in the cash disbursements journal.

income and expenses of the business were reflected on his individual income tax returns for each of the calendar years 1961, 1962 and 1963.[2]

An audit of the tax returns of Salvatore and Margaret Cirami for each of the years 1961, 1962 and 1963 was conducted by Internal Revenue Agent Edward Carroll. Mr. Carroll's report reflects wholesale disallowances of claimed business expenses for each of the years 1961, 1962 and 1963, on the theory that such expenses were not substantiated.[3] The revenue agent made no adjustments to the gross receipts of Air Freight Haulage, Co., as reflected on Cirami's income tax returns for each of the years involved. Gross income for each of such years was therefore determined to be correctly reported.

Further adjustments made to the 1962 and 1963 tax returns were the total disallowance of all itemized deductions claimed by the defendants, on the theory that they had failed to substantiate the same.

On September 14, 1966, a statutory notice of deficiency was forwarded to Salvatore and Margaret Cirami reflecting the disallowances set forth in the report of Edward Carroll.

On September 21, 1966, Louis DeStefano, then Cirami's accountant, wrote the District Director of Internal Revenue advising that he was protesting the determinations set forth in the statutory notice. On September 28, 1966, the District Director of Internal Revenue, Brooklyn, New York, wrote Mr. DeStefano acknowledging receipt of his letter of September 21, 1966 and advising the matter was under consideration.

In reliance upon the District Director's response, a petition to the United States Tax Court, pursuant to Title 26 USC, Section 6213, was not filed. On March 3, 1967, assessments were made against the taxpayers for each of the taxpayers for each of the

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[2] Cirami filed joint Federal income tax returns with his spouse Margaret Cirami for each of the years 1961, 1962 and 1963.

[3] The items disallowed, purportedly for lack of substantiation, were reflected in the books and records of Air Freight Haulage Co.

years 1961, 1962 and 1963 in the amounts set forth in the statutory notice of deficiency.

On February 28, 1973, the United States commenced an action against the Ciramis and their son, James Cirami, and other defendants in the United States District Court, Eastern District of New York. The government sought to reduce to judgment the Federal tax assessments against Salvatore and Margaret Cirami, arising out of the income tax liabilities for 1961, 1962 and 1963, to set aside certain transfers made to James Cirami by Salvatore Cirami, to foreclose the tax liens against certain properties and rights to such properties allegedly belonging to Salvatore and Margaret Cirami, and to obtain a judgment against James Cirami, as a transferee of assets of his father.

The defendants, in an effort to defend the action brought against them, retained the services of one Peter Newman, Esq., to represent them. Newman filed an answer on behalf of his clients, on March 20, 1973, which, in essence, was no more than a general denial of the allegations set forth in the complaint. In addition, a counterclaim was made on behalf of Salvatore and Margaret Cirami, subsequently dismissed by the District Court.

Pursuant to a motion filed on May 17, 1973 by the United States, a motion for partial summary judgment was filed by the government, as concerns the assessments of tax made against them in the statutory notice of deficiency. The Notice of Motion was sent to their then attorney, Newman, the defendants themselves being unaware of it. No opposition was filed by defendants' counsel, Peter Newman, to such motion when, in fact, there were sufficient factual and legal bases to oppose such motion.[4]

On June 12, 1974 partial summary judgment was entered in favor of the United States to the extent that plaintiff now has a

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[4] The factual basis for opposing the Motion for Summary Judgment is the existence of books and records which substantiate the disallowed expenses. The legal basis for opposing the motion is that even without considering the records, the defendant would be entitled to an allowance of a reasonable amount of business expenses. *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930).

final judgment against Salvatore and Margaret Cirami for income tax liabilities for the calendar years 1961, 1962 and 1963 in the amount of $270,792.43, plus interest from the date of entry. On July 5, 1974, Notice of Entry of Judgment was filed.

Subsequent thereto, defendant Salvatore Cirami changed legal counsel to Carl Mione, Esq., and defendant Margaret Cirami substituted the firm of Wagman, Cannon & Musoff, P. C., as counsel.[5]

On May 1, 1975, defendants-appellants filed a Notice of Motion, returnable before the Honorable Walter Buchhausen, United States District Judge, Eastern District of New York, on May 27, 1975, together with supporting papers, for an order vacating the summary judgment entered in favor of the Government against the Ciramis on June 12, 1974, in the amount of $270,792.43, plus statutory interest.

On May 27, 1975, a hearing was held in the chambers of Judge Buchhausen. As a result, defendants were granted leave until July 1, 1975 to file additional data in support of the Motion to Vacate Summary Judgment.

On July 1, 1975, defendants submitted additional factual data to support the motion. The documentation consisted of affidavits from the two accountants, Seymour Unterberg and Bernard Zipern, who audited the books and records of Air Freight Haulage Co. during the years 1961, 1962 and 1963, a series of thirty exhibits of records of Air Freight Haulage Co. from the years 1961, 1962 and 1963, including the check disbursements journal from January, 1959–November 12, 1963, the check stubs from March 4, 1961–June 16, 1972 and April 16, 1963 through August 10, 1963[6] and payroll books for the years 1961, 1962 and 1963, and an analysis by Seymour Unterberg verifying substantially all the business expenses claimed on the tax returns of

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[5] All the Ciramis are now represented by Wallace Musoff, Esq.

[6] The cancelled checks could not be located, although they had been examined by the original auditor, Revenue Agent Carroll.

defendants for the years 1961, 1962, 1963 per the available records, as submitted to the Court.[7]

On September 3, 1975, the plaintiff filed a Supplemental Memorandum in Opposition to taxpayer's Motion to Vacate Summary Judgment. Ostensibly, this memorandum was to respond to the data submitted. In fact, it did not. The sum and substance of the government's response was that the affidavits of the two accountants who did the bank reconciliations for Air Freight Haulage Co., verifying that the checks set forth in the check disbursements journal were cancelled, did not, in the absence of the actual cancelled checks, corroborate payment. Second, the government, by citing a conviction of Salvatore Cirami for the years 1967 through 1970—four years subsequent to the last taxable year involved in the instant case—for activities involving a separate and distinct corporate entity, Air Package Distribution Service Ltd., *not* Air Freight Haulage Co., endeavored to persuade the District Court that the Ciramis were not worthy of relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.[8]

On October 6, 1975, Judge Bruchhausen issued a Memorandum and Order denying defendants Motion to Vacate Summary Judgment. The substance of the Court's opinion was that a motion pursuant to Rule 60(b)(6) was not timely, the defendants did not overcome the presumption of correctness of the assessments, and extraordinary circumstances to grant the relief under Rule 60(b)(6) had not been shown.

B. *Prior proceedings on appeal*

The Court of Appeals for the Second Circuit initially affirmed Judge Bruchhausen's denial of Rule 60(b)(6) relief, holding that

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[7] Copies of all records submitted to the Court were timely submitted to plaintiff.

[8] It should be noted, that the conduct for which Cirami and his son were convicted (attempted evasion of FICA taxes) has been decriminalized under the new regulations (See CCH, Standard Federal Tax Reports Vol. 66, No. 14, March 28, 1979) whether an individual is an employee or an independent contractor is no longer being pursued by the government, since it is recognized that it is not economically harmed.

although Cirami had submitted extensive evidence relative to the merits of the underlying tax claim, no evidence was submitted of any circumstances pertaining to the failure of their *then* attorney, Newman, to respond to the government's Motion for Summary Judgment on the tax assessment claim, *United States v. Cirami*, 535 F. 2d 736 (2d Cir. 1976).

Thereafter, the Ciramis' new counsel, Wallace Musoff, filed a second motion for Rule 60(b)(6) relief, which included affidavits basically alleging that the failure of the Ciramis *then* counsel, Newman, to respond to the government's summary judgment, was due to a psychological disorder suffered by Mr. Newman manifesting itself in his inability to complete work promised for his clients, which ultimately led to Bar Association grievance proceedings being brought against him for similar failures in behalf of other clients, resulting in Newman's suspension as a practicing attorney.

Also submitted with this renewed motion was a memorandum written by the government attorney then handling the Cirami matter, showing that the government knew before its motion for summary judgment was granted, that even Judge Bruchhausen, before whom the action was pending, was unable to reach Mr. Newman.

This memorandum was first discovered by the Ciramis new attorney, Wallace Musoff, pursuant to Freedom of Information Act disclosures.

The renewed or second Rule 60(b)(6) motion was denied by the District Court based on a misapplication of the "law of the case" doctrine.

In the second appeal to the Second Circuit, the District Court's order was reversed, and the matter was remanded for a hearing, *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977). The Second Circuit held that the Ciramis had alleged a set of "exceptional circumstances" resulting in a "situation of extreme hardship" to them. Because it would be appropriate to accomplish justice, they held that these allegations, if proved, would justify Rule 60(b)(6) relief.

The Second Circuit's decision reversing the District Court and remanding the matter for a hearing was handed down on December 1, 1977; the hearing on remand was not held by the District Court until May of 1981. It is from the decision of the District Court pursuant to this hearing that this petition is made, said order having been affirmed by the Second Circuit (Appendix B, *infra*), and the petition for rehearing denied (Appendix C, *infra*).

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS PROVED THE EXCEPTIONAL CIRCUMSTANCES RESULTING IN EXTREME HARDSHIP JUSTIFYING RULE 60(b)(6) RELIEF; THE DISTRICT COURT'S ORDER DENYING RELIEF WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE.

Petitioners are mindful of the heavy burden of persuasion they bear in order to convince this Court that the District Court's decision denying Rule 60(b)(6) relief should be reversed. Findings of fact by a lower Court are not set aside on appeal unless they are clearly erroneous and against the weight of the evidence. The "clearly erroneous" test can be summarized as having been satisfied when a reviewing Court finds that—although there is evidence supporting the finding—on reviewing the entire record, it is left with a definite and firm conviction that a mistake has been committed, resulting in an injustice. See, e.g., *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190 (1960); *Guzman v. Pichirillo*, 369 U.S. 698, 82 S. Ct. 1095 (1962); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 83 S.Ct. 1773 (1963), setting aside as clearly erroneous; on remand, 231 F. Supp. 240, (S.D.N.Y. 1964); *Roemer v. Board of Public Works*, 426 U.S. 736, 96 S.Ct. 2337 (1976); Rule 52(a) F. R. Civ. P.

With this standard in mind, petitioners submit that the District Court's decision based on the evidence presented at the hearing was clearly erroneous, as shown by the following analysis.

A.

THE DISTRICT COURT'S ANALYSIS OF THE EVIDENCE WAS NOT OBJECTIVE, BUT PREJUDICED BY ITS PREJUDGMENT OF THE MERITS OF THE UNDERLYING TAX ASSESSMENTS.

The Court of Appeals, in reversing the District Court's initial denial of Rule 60(b)(6) relief remarked that the facts as alleged in the moving papers and affidavits outlining the basis of the Ciramis claim for relief told an "extraordinary" tale (563 F.2d 26 at 34), and concluded its opinion by making the following observation:

> While we do not, of course, pass upon the merits of the defenses asserted by the Ciramis to the underlying tax assessments against them, we do observe that their submissions, if established at trial, could well result in a substantial reduction of the amount of tax and interest claimed by the government and awarded in full by Judge Bruchhausen in granting summary judgment on the tax assessment claim, thereby considerably ameliorating what the Ciramis have sought to show is a most severe blow to them. (563 F.2d 26 at 35).

With these prefatory remarks, this Court then remanded the case for an evidentiary hearing on the allegations made in support of the motion, stating that these allegations—if proved—would constitute a basis of Rule 60(b)(6) relief.

The Court of Appeals did not pass upon the merits of the underlying tax assessments and the Ciramis' defenses to them, because they were not before them for decision. Neither were they before the District Court to pass upon on remand. For that

reason, no evidence on the merits of the underlying tax assessment was presented.

Yet, in a cruel parody of the Court's observations made in reversing and remanding, the District Court—in the very first sentence of its memorandum—decided the merits of the underlying tax assessments made against the Ciramis adversely to them. Most remarkably, of course, it did so without hearing any evidence whatsoever on the merits, *which were not before the Court for consideration.*

In reaching out and doing so, the District Court not only elevated what still remains solely an administrative entry made by the auditing agent to a final judgment immediately enforceable at disastrous consequences to the Ciramis, but also colored its judgment in evaluating the evidence on the only issue which was before it: whether the Ciramis had proved extraordinary circumstances resulting in a great hardship, justifying the setting aside of a summary judgment against them of almost $300,000.00, plus statutory interest.

Thus, the District Court's finding that "This is an extraordinary case, not by reason of anything the defendants have shown but because of their adroitness in avoiding payment of tax deficiencies . . ." is not only clearly erroneous in that it is without basis in fact or evidence, but indicative of his attitude towards the defendants.

Similarly, the District Court gratuitously observes that although the government has been accruing interest on the amount assessed, the inflation rate over the years has reduced it to a "relatively small amount," and further, that the evidence tended to show him that the defendants were not in a hardship position, but "just the opposite" in terms of their ability to pay the taxes assessed. (Footnotes 1 and 3 of memorandum of the District Court dated December 8, 1981).

The remarkable end result was that the District Court—without having the matter before him on its underlying merits, and without hearing a shred of evidence on these issues—was able to totally reverse the observation and tenor of the Court of

Appeals as quoted earlier, and set the stage for findings of fact on the only issue actually before him, which were clearly erroneous and against the weight of the evidence.

B.

THE FINDINGS OF THE DISTRICT COURT WERE CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE.

The District Court concluded that the granting of summary judgment by Judge Bruchhausen was predicated not on any misconduct or any "mental disorder" of attorney Newman, but rather the failure of the defendants to provide Newman with "not even one single document with which to oppose the motion."

To come to this conclusion, the District Court relies almost exclusively on the testimony of attorney Newman offered at the remand hearing. Before analyzing that testimony, it is appropriate to put it in its proper context, not only of this entire case, but more specifically of the remand hearing itself.

As the attorney who represented the Ciramis at the time the government's motion for summary judgment was granted "without opposition," Newman clearly was as much an interested witness in this proceeding as is the defendant Cirami himself.

Newman himself realized this, and manifested a reluctance to even testify at these proceedings out of fear of saying something on the record, under oath, which might subject him to either a malpractice claim by any number of former clients, or another disciplinary proceeding before the Grievance Committee of the Bar Association. Newman initially applied to the District Court for a sealing order, which was denied. Newman's initially stated reason was to spare himself embarrassment, then one of privilege as to his past treatment for his mental disorder. Eventually, the District Court *sua sponte* recognized that there was indeed a problem as to Newman giving testimony, and adjourned his appearance for several weeks so that he could consult with an

attorney, not wanting to put Newman in a position ". . . which is going to prejudice you or get you into trouble" as well as to consider various privileges possibly available to him, such as attorney-client and Fifth Amendment. The District Court also recognized Newman's potential civil liabilities resulting from his proposed testimony, and commented that he had "various complicated problems."

It might be parenthetically added at this point that the delay from the time of the Second Circuit's decision remanding the matter for a hearing (September, 1977), to the date of the actual hearings (May, 1981)—a period of almost four years—was occasioned by the District Court's allowing Newman time to straighten out his various personal problems, including the proceedings before the Bar Association Grievance Committee resulting in a suspension of two years, discussed later.

Secondly, it is uncontradicted that Newman had a mental disorder for which he received extensive treatment (between 60 and 80 sessions) over a two-year period from a licensed psychologist. This treatment was terminated unilaterally by Newman in 1971 *not* because he could in any way be considered improved, but rather that he in fact was not better and still suffering from the disorder; Newman himself later admitted that his problem *got progressively worse* in the following years, and manifested itself in disastrous consequences for him both personally and professionally, the most obvious result being his suspension from practice as an attorney. The testimony of Dr. Zacker is brief, uncontradicted, and amply demonstrates not only that Newman was suffering from a *real*, clinically identifiable mental disorder, but also that the behavioral manifestations relative to his lack of performance and failure as attorney for the Ciramis in this case is consistent with this disorder.

Thirdly, it is uncontroverted that attorney Newman was the subject of disciplinary proceedings resulting in his suspension from practice as an attorney for conduct which his attorney at the initial states of *those* proceedings characterized as ". . .exactly the same situation that happened in this (Cirami) case."

A brief summary of the file of the Appellate Division Second Department, received in evidence in its entirety at the hearing

before the District Court, reveals that the proceedings against Newman were initiated by a Joint Bar Association Grievance Committee for the Tenth Judicial District. The matter was eventually heard by a referee who took testimony, including Newman's. Pages 225-229, 234-235, 258-260 of Newman's testimony before the referee again is replete with references to his mental disorder as being the cause of his professional problems.

The referee, by a report dated April 29, 1977, recommended suspension, citing at page 11 of his report, Newman's mental problems. On August 1, 1977, the Appellate Division of the Supreme Court of the State of New York for the Second Department suspended Newman from practice for an indefinite period of time *until he adduced proof that he possessed the emotional stability required of an attorney*. On November, 1977 Newman petitioned for reinstatement. This petition was denied on April 11, 1978 because Newman did not yet demonstrate his emotional stability. Additionally, the subcommittee cited Newman's failure to respond to a second set of charges.

Dr. Reiter (Dr. Zacker's supervisor) again treated Newman from August to December of 1977, and again in February of 1978. On June 16, 1978 the matter was again remitted to a subcommittee on Newman's motion to be reinstated. After considering the further report of Dr. Reiter, as well as that of an independently appointed psychiatrist, concluding that Newman now possessed sufficient emotional stability, the sub-committee recommended reinstatement. On April 20, 1979, Newman was reinstated to practice as an attorney by order of the Appellate Division.

The disciplinary file of the Appellate Division amply and clearly demonstrates that Newman's professional problems and failures had their genesis in severe emotional and mental problems. In fact, they were so severe that he was suspended from practice for lack of the requisite emotional stability required of an attorney. It further demonstrates that, only after several psychiatrists certified Newman to be emotionally stable, was he again reinstated to practice. The disciplinary proceeding file amply corroborates Newman's own testimony at this hearing

that his problems only got worse *after* he discontinued his sessions with Dr. Zacker in 1971.

It is with this background that one must evaluate the District Court's acceptance of Newman's testimony that Cirami "did not supply him with one iota of business records, resulting in his inability to oppose the government's summary judgment motion." Not only does this assertion contradict the testimony of Cirami and DeStefano, that records were made available to Newman but—most importantly—flies in the face of the physical existence of *seven large brown file envelopes of business records* docketed with the District Court, as part of this lawsuit.

The District Court selectively credited that aspect of Newman's testimony, yet completely ignored his testimony that he failed to return calls to avoid lying to his clients about the progress of their matters, as well as his constant assurances to inquiries that he was "taking care of matters" and that everything was "under control." It also ignored Newman's testimony wherein he articulated defenses he knew he could have raised in opposition to the summary judgment motion, yet failed to do. It also ignored Newman's testimony that he did not necessarily believe DeStefano that the records were lost, and in fact believed that government agents were probably in possession of these records. It also ignored his testimony of missing meetings in chambers, doing things in a "sloppy manner" in "those days," and failing in his obligation as attorney to Mr. Cirami.

The record of Newman's testimony is replete with his pervasive inability to recall any of the basic facts and events concerning his representation of Mr. Cirami. Much to the District Court's amazement, Newman could not even recall the *year* he was admitted to the bar! Yet, despite this record of testimony and background, the District Court chose to credit one aspect of his testimony—that not one substantiating record was ever made available to him—and then makes it the entire rationale of its decision denying relief to the Ciramis.

Even more amazingly, the District Court found Newman's conduct *after* the summary judgment motion was granted, to be "sensible" and "logical" under the circumstances. It reaches

this conclusion from the fact that Newman again reappeared for later conferences and maneuverings regarding the fraudulent conveyance aspects of the case. Yet, it fails to realize that once the underlying tax assessments were reduced to judgment—which they now were due to Newman's failure to oppose the summary judgment motion—the transfers in question become fraudulent by simple operation of law, there being no issues to litigate any further, since the tax liabilities would render Cirami insolvent as of the date of the transfers.

Oddly enough, the District Court does not even mention the fact that at the very crucial time when the summary judgment motion was about to be disposed of, even Judge Bruchhausen's law clerk, on two occasions, was unable to reach Newman, who had missed appearances scheduled in chambers on the summary judgment motion. Yet, in light of this conduct by an attorney, the District Court calls counsel's argument that Newman "constructively disappeared" a "fantasy," "completely destroyed" by the fact of Newman's later appearances. One can only ask: To what avail were the attorney's further services to his client, once he allowed the one and only crucial aspect of the litigation—for which he was paid and retained as a lawyer who held himself out as an expert in tax matters—to flow, unhampered, down the drain?

The same can be said for the District Court's conclusion that the Ciramis failed to show that Newman was suffering from a mental disorder "sufficient to affect his performance in the case." Yet, the expert testimony was uncontradicted, detailed, and to the point. Certainly the Appellate Division of the State of New York—charged by law[9] with the supervision and discipline of its licensed attorneys—thought it was "sufficient to affect his performance," since it suspended him from practice for almost two years (1977 to 1979) for that very reason. Only after it was convinced—through the testimony of several psychiatrists (including an independent, court-appointed one)—that Newman was sufficiently emotionally stable, was he readmitted to practice.

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[9] McKinney's Judiciary Law, Section 90

Curiously enough, just after Newman's testimony at the hearing, the District Court commented to the effect that an attorney would not have to be psychotic, only "sufficiently mentally deranged, not to be looking after which (he) assumed a professional responsibility for," an eminently correct observation.

Similarly not mentioned in his memorandum is the extensive, uncontroverted—moreover, corroborated by Newman—testimony of Cirami, Mione (the original referring attorney) and DeStefano, attesting to the dozens of inquiries each made to Newman for status reports, both before and after the default. On those occasions when he was reached, Newman's response always was "everything is under control" and "I am taking care of it," as Newman himself admitted.

C.

THE DEFENDANTS HAVE MET THEIR BURDEN OF PROOF.

It is respectfully submitted that the evidence adduced at the hearing indeed amply demonstrates Newman's "constructive disappearance," and that he was indeed suffering from a clinically identifiable mental disorder (passive-aggressive personality disorder) which led him to neglect completely the most crucial aspect of his clients' business, while at the same time assuring them—as well as the referring attorney and accountant—that he was attending to it, and who had even made himself unavailable even to the trial judge at the most crucial juncture of the case. Moreover, the evidence clearly demonstrates that Newman's conduct was engendered by a mental disorder which manifested itself to the clients only after they had relied on him for months, and the case was (for all intents and purposes) totally lost.

Further, the evidence at the hearing demonstrated that not only Cirami himself, but also attorney Mione, accountant DeStefano and *Judge Bruchhausen's law clerk as well*, made repeated diligent efforts to contact Newman, to no avail.

Newman did not miss out on one small procedural step in a complicated litigation; *he blew the entire case*. He did not miss an ordinary appearance to conference some insignificant aspect of the case; *he failed to appear* at chambers on the most crucial aspect of the entire case, and *made himself unavailable* to the U.S. District Judge in charge of the litigation—despite repeated warnings and notices—who was about to terminate it most unfavorably to his clients.

Newman's failure in early 1974 to file opposing papers and attend chambers conferences had devastating results to the client who retained him to represent their interests. First, the huge amount of the actual judgment is still on file, just waiting to be collected, pursuant to which Cirami, his wife, his son and daughter-in-law can all be literally ruined professionally and personally (by the sale of their homes). Then there is the incalculable cost—not only in dollars and cents, but endless anguish—of more than eight years of litigation, including three appearances before the Court of Appeals. All to obtain the right to merely deal with the case on its merits, which have yet to be reached since the administrative entry assessing taxes was made in 1967, almost fifteen years ago.

Surely, it is the height of insensitivity and basic injustice to characterize an individual's attempts to challenge a patently unfair unilateral tax assessment, made by an auditing agent, as the "skilled adroitness in avoiding payment of taxes." This is especially so since the District Court is willing to accept, without a basis in fact, the proposition that such assessed tax deficiencies are correct, and the Ciramis owe them. In fact, the conclusion is inescapable that the assessments were totally arbitrary. Even the Court of Appeals, in its opinion reversing and remanding the District Court's decision—while being careful to note that it was not determining the case on its merits—recognized that the documentary submissions filed with the appeal ". . . could well result in a substantial reduction of the amount of tax and interest claimed by the government and awarded in full by Judge Bruchhausen in granting summary judgment. . ."

In *Foley v. United States, et al*, 645 F.2d 155 (2d Cir. 1981), the Second Circuit held the denial of a Rule 60(b) motion to

vacate a judgment of dismissal based on inexcusable delay to have been an abuse of the District Court's discretion. *Foley, supra*, was a lawsuit for personal injury. In reversing the denial of the Rule 60(b) motion to vacate, the Second Circuit observed that "Dismissal is a severe and unrelenting remedy for the series of mistakes and logistical difficulties that befell the plaintiff in prosecuting this claim," and that it was difficult to imagine what prejudice might arise to the government in comparison to the substantial injustice suffered by the petitioner.

These questions beg to be answered in this case. What prejudice would the government in this case suffer in comparison to the substantial injustice suffered by the Ciramis, in having a determination of their tax liability *on its merits*? What more severe and unrelenting remedy than the summary judgment entered in this case can be imagined based on the difficulties that befell the Ciramis as a result of attorney Newman's failures?

This petition represents the Ciramis the last chance to obtain the justice they are entitled to, and which this Court can and must give them.

CONCLUSION

It is respectfully submitted that this case represents an aggravated instance of the need for relief for which Rule 60(b)(6), Federal Rules of Civil Procedure was designed. To begin with, there was the arbitrary nature of the statutory notice of deficiency which never was dealt with in its merits in the Tax Court through no fault of the petitioners. The record of their then attorney in dealing with the government's motion for summary judgment can only be described as appalling. Motions for summary judgment almost never lie, since they are not proper where contested issues of fact exist. Yet, the arbitrary statutory notice of deficiency—totally disallowing any costs to a service business—is now elevated to the level of a final judgment. Additionally there are the uncontroverted facts of the attorney suffering from a recognized mental disorder and his suspension from practice for identical failures on behalf of other clients he represented during the same period of time.

On the other hand we have a petitioner who did—and continues to tenaciously do—everything in his power to meet the issues on their merits, yet found himself let down at the most crucial stage by an attorney he hired and paid to represent his best interests.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

SALVATORE CIRAMI, et al.,
Defendants.

73 C 274

MEMORANDUM & ORDER

December 8, 1981

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PLATT, D.J.

This is an extraordinary case, not by reason of anything the defendants have shown but because of their adroitness in avoiding payment of tax deficiencies of $153,087.34 plus a penalty of $19,570.91 assessed against them for the years 1961-63.[1] To appreciate the skill of defendants in this respect, one must first read the Court of Appeals opinions[2] reported at 535 F.2d 736 (1976) and 563 F.2d 26 (1977) (familiarity with which is assumed here) and the record established before this Court in the evidentiary hearing on remand.

Following such hearing, this Court finds that the defendants have failed to show, under Rule 60(b)(6), "exceptional circumstances" or "extreme hardship."[3] With respect to the "excep-

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[1] While the government has been accruing interest on this amount, the inflation rate for the past 20 years has reduced the same from a substantial to a relatively small amount.

[2] The history of this action is set forth in detail in these opinions and will not be repeated here.

[3] There was no evidence whatever which even tended to show that the defendants were not in a position to pay the taxes. Indeed, if anything, the evidence tended to show just the opposite. (C-II.24-27).

The transcript references are based on the following:

C-I —Mr. Cirami's testimony on May 22, 1981
C-II —Mr. Cirami's testimony on May 29, 1981
N —Mr. Newman's testimony on June 19, 1981
M-I —Mr. Morrow's testimony on July 10, 1981
M-II—Mr. Morrow's testimony on July 13, 1981
A —separately bound joint appendix submitted to the Court of Appeals.

tional circumstances" test, in the first of its two opinions on the defendants' present motion the Court of Appeals told the defendants what one must do to sustain a motion of this sort in the following words (535 F.2d at 741):

> The case before us is clearly distinguishable. There is not the unusual circumstance of attorney disappearance, and there is no allegation of any effort to contact the former attorney to ascertain the status of the litigation at any point or even to provide the court below with any explanation for his failure to oppose the motion for summary judgment. *L.P. Steuart, Inc. v. Matthews, supra*, is equally inapposite. In that case former counsel's affidavit revealed that at the time of his default he had been beset by personal problems, including the death of his parents and the serious illness of his wife. Moreover, his client's affidavit noted that he had made numerous inquiries of his former counsel who had either refused to answer or had assured him that the case was proceeding and would soon be settled. Judge Edgerton found that Rule 60(b)(6) was broad enough to permit relief when "personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client." 329 F.2d at 235.[3] (footnote omitted).

The defendants appear to have attempted to comply with the factors set forth in the Court of Appeals' discussion by pointing up "personal problems" of "former counsel" in the second of their two motions.

The difficulty here, however, with defendants' new motion is that whatever problems Peter R. Newman, Esq., may or may not have had in the winter and spring of 1974 they were not the cause of the "no opposition" to the government's original partial summary judgment motion.

The record is clear that Mr. Newman was retained by the defendants in or about March 1973 "within a day or two days" of the time an answer to the government's complaint was due to be filed in this case. (N. 23). Assuming, *arguendo*, that the

defendants did not appreciate the fact that they needed to assemble and exhibit to the Internal Revenue Service records to substantiate the business expenses and deductions which they had claimed on their tax returns from a date of the assessment in or about 1966 to the date of Mr. Newman's retention—i.e., for seven years or more (and that is a big assumption in defendants' favor), they knew in March of 1973 that such documentation was needed because Mr. Newman told them so (N. 23-24, 30). Mr. Cirami told Mr. Newman to see his accountant, De Stefano, who he said knew where these documents were (N. 24-25, C-1, 90-91). Mr. Newman did so several times and finally Mr. De Stefano advised him that they were all lost (N. 27, 47-48).

Mr. Newman reported to Mr. Cirami that Mr. De Stefano had informed him that all the records were lost and Mr. Cirami then expressed to Mr. Newman that he had a very low opinion of Mr. De Stefano for losing the records (N. 30). The Court credits the foregoing testimony of Mr. Newman and his statements that despite repeated efforts and requests by him of Mr. De Stefano and Mr. Cirami, not one substantiating record was ever made available to him (N. 24, 27, 30). Mr. Newman's testimony in this respect was fully corroborated by government counsel William Morrow who testified (M-II.10-11) that Mr. De Stefano told him he could not find any cancelled checks, invoices or receipts.

During the ensuing nine-month period from March to December 1973 when the government made its motion for summary judgment, Mr. Newman scarcely acted like one who was not tending to his clients' business. Not only did he make repeated requests of Messrs. Cirami and De Stefano for the pertinent records but he made trips to Puerto Rico and Washington, argued and filed an affidavit in September in opposition to the government's motion to dismiss defendants' counterclaim and filed a brief in support thereof.

On December 28, 1973 the government made its motion for partial summary judgment with a return date of February 6, 1974. On the latter date[4] Mr. Newman appeared in Judge

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[4] Mr. Newman also attended a status conference on January 3, 1974.

Bruchhausen's chambers and explained to the Judge's law clerk that the defendants had not been able to supply him with any books or records or any cancelled checks or receipts to substantiate their claimed deductions. He asked for more time to find such records and the law clerk after conferring with Judge Bruchhausen gave him two additional weeks, i.e., to February 15th and the government was given until March 15th to reply.

Between February 6th and March 1 Mr. Morrow conferred with Mr. Newman who said that he had not been able to obtain any records from the defendants.

The reason then for the lack of opposition to the government's motion was, not as defendant now claims, due to Mr. Newman's condition, but because of the defendants' failure to give him any records—not even one single document with which to oppose the motion.

Under the circumstances Judge Bruchhausen properly entered an order granting the government's motion, not on default, but on the ground that there was "no opposition" thereto.

The fantasy that Mr. Newman was unaware of what was happening in this case and that he had "constructively disappeared" is completely destroyed by the events which followed. Shortly after the entry of partial summary judgment in favor of the government on March 18-19, 1974, there was a status conference held in this Court before Judge Bruchhausen on April 10, 1974. (A-2). Mr. Newman attended this status conference (M-I.19) and was aware that the government's motion for partial summary judgment had been granted (M-I.19-21). The status conference was held to set a discovery and trial schedule on the fraudulent conveyance issue which was the only issue left in the lawsuit (M-I.19-21). Most significantly at that status conference Mr. Newman claimed he was "bound in" by the fact that Mr. Cirami had been convicted in a criminal trial for evasion of certain other taxes. Mr. Newman said that because of an appeal of that conviction, Mr. Cirami could not appear in this civil case for depositions or trial (Government Ex. 3). Therefore, at Mr. Newman's request, the status conference was adjourned until June 24, 1974 (Government Ex. 3, A-2). Again

at the adjourned date for such status conference, to wit, on June 24th, Mr. Newman appeared and made a further request for a continuance because of Mr. Cirami's appeal from his criminal conviction (M-I.21-22).

Moreover, as must be clear from the facts found above, the defendants failed to show on the remand hearing that Mr. Newman was suffering from a mental disorder sufficient to affect his performance in this case. It may well be that Mr. Newman failed to advise his client of the entry of the order for partial summary judgment. However, it appears quite clear that (i) he felt the matter was hopeless and (ii) he thought he should "buy time" for further discovery on the fraudulent conveyance issue on the strength of Mr. Cirami's conviction and appeal—a very sensible and logical thing to do under the circumstances.

Furthermore, Mr. Newman was not "seeing a psychiatrist during this period" (563 F.2d at 31). He had voluntarily discontinued seeing a psychologist in September 1971—three years before the events recorded here. Moreover, the Bar Association records tend to show not that he had a mental disorder but that he negligently failed to do certain things. This, needless to say, did not constitute proof of negligence in this case.

The long and the short of this whole proceeding is that the defendants failed to show that any misconduct or "mental disorder" on the part of Mr. Newman was the cause of there being no opposition to the government's motion for partial summary judgment herein and accordingly, the defendants owe the government the sum of $153,087.34 plus $19,578.91 in penalties, plus a large amount in interest and should be required to pay the same forthwith. If the government wishes to pursue the fraudulent conveyance issue, it should communicate with Deputy Clerk Bruce Nims (212/330-7928) and arrange for a scheduling of a trial.

SO ORDERED.

/s/ Thomas C. Platt

U.S.D.J.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and eighty-two.

Present:

HONORABLE J. EDWARD LUMBARD,

HONORABLE IRVING R. KAUFMAN,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE CIRAMI,

Defendant-Appellant.

82-6007

MARGARET CIRAMI, JAMES CIRAMI, MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION, NANCY CIRAMI, DIGGS MANAGEMENT CORP., JACOB ZELIGFELD, PRUDENTIAL INSURANCE COMPANY OF AMERICA, ANGELA CIRAMI and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. In 1973, the Government filed a complaint against appellant Cirami and others seeking a judgment for over $200,000 in unpaid tax assessments and to set aside certain fraudulent conveyances. This tax deficiency resulted from the disallowance of deductions in 1961, 1962, and 1963, which Cirami claimed in the operation of his business, Air Freight Haulage Co., for lack of substantiation.

2. In December, 1973, the Government filed a motion for summary judgment solely on the claim involving the tax assessments. Peter Newman, who had been representing Cirami in this matter, did not oppose the motion. Judge Bruchhausen granted the Government's motion, and final judgment was entered in June, 1974. In May, 1975, a motion was filed pursuant to Federal Rules of Civil Procedure, Rule 60(b)(6), to vacate the June judgment. The motion was denied by the district court, and we affirmed. *See United States* v. *Cirami*, 535 F.2d 736 (2d Cir. 1976).

3. Several months later, a second Rule 60(b)(6) motion was filed alleging that the reason for the lack of any opposition to the Government's 1973 motion was the newly-discovered fact of Newman's mental illness. The district court denied the motion, but we reversed and remanded the case for an evidentiary hearing to determine whether attorney Newman had a mental illness and whether that illness resulted in the absence of a responsive pleading to the motion for partial summary judgment. *See United States* v. *Cirami*, 563 F.2d 26 (2d Cir. 1977).

4. On remand, after six days of hearings, Judge Platt found that Cirami failed to show that Newman was suffering from a mental disorder sufficient to affect his performance.

Futhermore, he found the reason for the lack of a response to the Government's motion was Cirami's failure to provide the business records necessary to oppose the motion. Accordingly, determining that the "exceptional circumstances" necessary for relief were not present, *see Rinieri* v. *News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967), he denied the motion.

5. Appellant Cirami challenges Judge Platt's findings of fact. We will not set aside the findings of fact of the district court unless they are clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a); *see Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291 (1960). Evidence presented at the hearing, although conflicting in some respects, demonstrated, *inter alia*, that Peter Newman, during the nine-month period from March to December, 1973, when the Government moved for summary judgment, made repeated requests of Cirami and his accountant DeStefano for the relevant records, made trips on Cirami's behalf to Washington and Puerto Rico, answered the February, 1973 Government complaint, argued and filed an affidavit in opposition to the Government's motion to dismiss defendants' counterclaim and filed a brief in support.

6. After the Government filed its motion for partial summary judgment, Mr. Newman appeared at several status conferences and explained he had not received records to substantiate the challenged deductions. Furthermore, he conferred with Government counsel William Morrow regarding his inability to obtain any records. Moreover, after the entry of judgment in favor of the Government, he continued to attend status conferences to discuss the summary judgment motion and the fraudulent conveyance issue.

7. Mr. Newman, furthermore, was not under psychiatric care during this period, and the Bar Association records of proceedings against him do not tend to show a mental disorder but rather that he was negligent in handling some clients' cases.

8. Based on this evidence, Judge Platt could properly find that Mr. Newman was not suffering from mental illness, and that a mental disorder was not the cause of the absence of a responsive pleading to the Government's motion for partial summary judgment. We do not find the district court's findings to be clearly erroneous. Accordingly, we are of the view that Judge Platt correctly denied the motion for relief pursuant to Rule 60(b)(6).

9. Appellant's other claims are equally without merit.

/s/
J. EDWARD LUMBARD,

/s/
IRVING R. KAUFMAN,

/s/
LAWRENCE W. PIERCE,
Circuit Judges.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of June, one thousand nine hundred and eighty-two.

Present:

HON. J. EDWARD LUMBARD,

HON. IRVING R. KAUFMAN,

HON. LAWRENCE W. PIERCE,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SALATORE CIRAMI, MARGARET CIRAMI, JAMES CIRAMI, and MASPETH FEDERAL SAVINGS & LOAN ASSOCIATION, 82-6007

Defendants,

SALVATORE CIRAMI,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant, Salvatore Cirami,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

By:
Francis X. Gindhart
Chief Deputy Clerk

Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER

No. 82-196

In the Supreme Court of the United States

OCTOBER TERM, 1982

SALVATORE CIRAMI AND MARGARET CIRAMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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SALVATORE CIRAMI AND MARGARET CIRAMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this federal tax case, petitioner[1] seeks review of the district court's factual conclusion that he failed to prove entitlement to relief from judgment under Fed. R. Civ. P. 60(b)(6). Petitioner's request for relief was predicated on his contention that his then counsel suffered from a mental disorder that resulted in inadequate representation.

The pertinent facts may be summarized as follows: In 1966, the Internal Revenue Service issued a notice of deficiency in income taxes to petitioner as a result of the disallowance of certain deductions claimed by him for the taxable years 1961 through 1963 in the operation of Air Freight Haulage Company (I-A. A42).[2] The deductions had been

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[1]Only Salvatore Cirami was a party to the appeal for which review is requested. Margaret Cirami never filed a notice of appeal. Salvatore Cirami is the sole petitioner properly before this Court.

[2]"I-A." and "II-A." references are to volumes one and two, respectively, of the Joint Appendix in the court of appeals.

disallowed for lack of substantiation. Petitioner neither sought review of the proposed deficiencies in the United States Tax Court nor paid the deficiencies to enable him to institute a refund suit in the district court. In 1967, the government assessed the taxes resulting from the deficiencies (I-A. A51), and in 1973 the government brought suit both to reduce the assessments to judgment and to set aside numerous fraudulent transfers of property from petitioner to his family (Pet. App. 2a-3a, 7a).[3]

Petitioner employed Peter R. Newman to represent him and respond to the government's complaint, but engaged him only three days before an answer to that complaint was due (Pet. App. 2a).[4] Newman timely filed a general denial and later a counterclaim (Pet. App. 2a-3a). Newman thereafter traveled to Puerto Rico and Washington, D.C., in an attempt to construct a case for petitioner. Neither petitioner nor his accountant was able to provide Newman with any records to substantiate the disallowed deductions. Petitioner told Newman to see his accountant for the records. Petitioner's accountant told Newman and government counsel that the records were lost. Although petitioner now claims that he had possession of substantiating records, he obviously knew that Newman did not have them (Pet. App. 3a; II-A. A371-A372, A376-A377).

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[3]Although the taxes in question were assessed in 1967, the Service has been unable to collect them because petitioner transferred his property to various family members. The government was constrained in its collection efforts because of the pendency of criminal proceedings against petitioner, which were finally resolved in 1975. *United States* v. *Ciraml*, 510 F. 2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975). Indeed, the government filed its complaint in this case before criminal proceedings against petitioner were completed in order to toll the six-year statute of limitations on collection of assessed taxes (26 U.S.C. 6502(a)).

[4]At the time Newman was hired, petitioner failed to tell him about the pending criminal matters (II-A. A310).

In December 1973, the government filed its motion for partial summary judgment on the issue of the underlying tax liability. A status conference on this motion was held in January 1974, which Newman attended. A further conference was held in February 1974, which Newman also attended and at which he requested more time to garner substantiating records. The district court gave Newman two additional weeks. At this time, Newman confirmed to government counsel that he could not obtain any records. Newman thus did not, because he could not, file a response to the summary judgment motion. The motion was granted in March 1974. Newman attended the next two status conferences in April 1974 and June 1974. Judgment was entered by the district court in July 1974, in the amount of $270,792.43, plus interest from that date. Newman was replaced as counsel for petitioner in October 1974 (Pet. App. 3a-5a, 7a-8a; I-A. A74-A75; II-A. A435).

In 1975 petitioner moved the district court, under Fed. R. Civ. P. 60(b)(6), to set aside the judgment. That motion was denied, and the court of appeals affirmed (Pet. App. 7a; 535 F. 2d 736 (1976)) and denied rehearing on June 1, 1976. Thereafter, petitioner, claiming "new evidence," filed a second Rule 60(b)(6) motion to set aside the judgment. The new evidence was the alleged mental illness of Newman. The district court rejected this contention as untimely, but the court of appeals reversed and remanded the case for a hearing to determine whether Newman had a mental illness and whether that illness resulted in the absence of responsive pleadings to the government's motion for partial summary judgment (Pet. App. 7a; 563 F. 2d 26 (1977)). After exhaustive hearings, the district court concluded that Newman's mental health problems, whatever they may have been, were not the cause of his failure to oppose the government's summary judgment motion (Pet. App. 2a). Rather, the district court determined that Newman's failure

to respond was due to petitioner's failure to provide records to oppose the motion (Pet. App. 4a, 8a). Accordingly, the district court denied petitioner's second Rule 60(b)(6) motion. The court of appeals determined that the district court's fact findings were not clearly erroneous and affirmed (Pet. App. 7a-10a).

1. Petitioner accuses the district court of prejudice in determining his Rule 60(b)(6) motion to set aside the judgment and asks this Court to set aside the district court's factual findings as clearly erroneous. His accusation of bias on the district court's part is completely unfounded, for that court expressed deep concern with petitioner's allegations (II-A. A454-A463). After days of testimony and observation of the witnesses, that court found, however, no factual basis to the petitioner's allegations and determined that petitioner had thus failed to make the requisite showing of "exceptional circumstances" warranting relief under Rule 60(b)(6). As petitioner recognizes (Pet. 9), this factual determination is reviewable under the clearly erroneous rule.

Petitioner renews his argument to the courts below that Newman's failure to oppose the government's motion for summary judgment was due to a mental disorder suffered by Newman. But the district court's factual finding, that Newman's failure to oppose the summary judgment motion was not due to a mental disorder, was found by the court of appeals to have ample support in the record (Pet. App. 9a). The district court found no convincing evidence that Newman suffered from a mental illness in 1973 and 1974 that led him to mishandle petitioner's case (Pet. App. 5a, 9a). Newman was diligent and timely in addressing other aspects of the case. He was present at court conferences before and after the summary judgment motion was made and granted. His only medical treatment, voluntarily sought, ended in 1971. There was no expert testimony that Newman suffered

any mental problem during the relevant period. Newman's difficulties with the bar association occurred years later and were, in any event, not related to a mental disorder (Pet. App. 2a-5a, 8a-9a).

The real cause for Newman's failure to respond to the government's summary judgment motion was that he was never given records to rebut the tax assessments, although Newman sought documentation in support of petitioner's claimed deductions (Pet. App. 3a-4a, 8a). Newman therefore had nothing upon which to base a defense.[5] Neither Newman nor any government employee has ever seen the substantiating records which petitioner claims once existed but are now lost.[6] The only records ever produced by petitioner—all after the fact—are of his own authorship. Not one cancelled check, invoice, or third-party document of any kind has ever surfaced to support petitioner's claimed deductions. The documents that petitioner did produce, which are reproduced in part (I-A. A91-A144), serve only to confirm that Newman, had he had access to them, would have possessed nothing with which to construct a defense to the government's motion for partial summary judgment.

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[5]Petitioner's reliance (Pet. 5) upon *Cohan* v. *Commissioner*, 39 F. 2d 540 (2d Cir. 1930), for the proposition that substantiating records are not necessary, is misplaced. The *Cohan* rule presumes the proven existence of business activity, not merely an assertion to that effect.

[6]Petitioner's statement (Pet. 6 n.6) that cancelled checks were seen by the original IRS auditor is without support in the record.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982